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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 716

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ET AL.,

Petitioner,

versus

SOUTHERN BUS LINES, INC.,

Respondent.

BRIEF FILED ON BEHALF OF RESPONDENT IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SOUTHERN BUS LINES, INC.,

Respondent.

BRIEF FILED ON BEHALF OF RESPONDENT IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT OF THE CASE.

In this action the petitioner, a labor union and one of its members, seek to recover damages for an alleged breach of a collective bargaining agreement between the Union and the defendant, Southern Bus Lines, Inc. At the time suit was filed, the employees, represented by the Union as their bargaining agent, were out on strike, and

the purpose of this suit is to recover, as damages, the wages that the men, still out on strike, would have earned had they remained at work. In fact, in the brief filed by petitioner in this cause, on page 3 thereof, under "Summary and Statement of Matters Involved," it is stated: "This suit is for wages alleged to be due the employees of Southern Bus Lines, Incorporated, under the terms of a contract of employment which it is alleged was breached by Southern Bus Lines, Inc. . . ."

Respondent filed a motion to dismiss the bill of complaint, and assigned as reasons in support of its action:

1. Improper venue;
2. Lack of jurisdiction;
3. Failure to state a cause of action;
4. Forum *non conveniens.*

When respondent's motion was first presented to the District Court, respondent filed a brief covering all of the points set out in its motion to dismiss. By agreement between the parties, however, the venue question, together with the question of forum *non conveniens*, was first argued to the Court, and by decree dated April 5, 1948, the District Court dismissed the bill of complaint for improper venue, providing further that if mistaken in that conclusion that it further finds that it was a proper case for the application of the doctrine of forum *non conveniens.*

Petitioners appealed this dismissal for improper venue by the District Court to the Court of Appeals for

the Fifth Circuit. That Court reversed the decision of the District Court on the question of venue, and the case was remanded for further proceedings. *(172 F. (2d) 946).*

Motions to dismiss for lack of jurisdiction and failure of the complaint to state a cause of action were then presented to the District Court, and that Court dismissed the complaint for failure to state a cause of action. Petitioners again appealed to the Court of Appeals for the Fifth Circuit, and, on appeal, that Court held that the case should have been dismissed for lack of jurisdiction, and the case was remanded to the District Court with instructions to dismiss for want of jurisdiction. *(189 F. (2d) 219).*

Petitioners did not seek to amend the bill of complaint in the Court of Appeals, but waited some sixty days, and then filed, with the District Court, a petition to amend. Respondent filed a formal answer opposing petitioners' motion to amend, and the District Court, after receiving briefs and hearing oral argument, declined to permit petitioners to amend and dismissed the case for lack of jurisdiction, pursuant to the mandate of the Court of Appeals. (R. 168).

Petitioners again appealed to the Court of Appeals and that Court dismissed the appeal for reasons stated in the opinion. (R. 175).

Ninety days from this dismissal, petitioners filed their petition in this Court.

GROUNDS URGED IN OPPOSITION TO THE GRANTING OF THE WRIT.

Respondent assigns as grounds for its opposition to the granting of a writ of certiorari, the following:

1. That the petition for the writ of certiorari was not timely filed and that this Court, therefore, does not have jurisdiction.

2. Petitioners do not assign as error a claim that the District Court abused its discretion in refusing to allow the proposed amendment.

3. If the application was timely filed and if this Court has jurisdiction, then the only issue is did the trial Court abuse its discretion in refusing to allow the amendment.

4. The District Court properly exercised its discretion in refusing to allow the proposed amendment.

We will discuss these matters in the order listed.

I.

THE PETITION FOR THE WRIT OF CERTIORARI WAS NOT TIMELY FILED AND, THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION.

Section 2101, United States Code Annotated, Title 28, provides as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied

for within ninety (90) days after the entry of such judgment or decree."

As previously shown in our statement of facts, the judgment or decree of the United States Court of Appeals for the Fifth Circuit, vacating and setting aside the case and remanding it to the District Court with instructions to dismiss for want of jurisdiction, was dated May 10, 1951. *(189 Fed. (2d) 219).*

On the 9th day of July, 1951, two months after the judgment of the Court of Appeals, motion for leave to amend the bill of complaint was filed in the District Court, no motion for a rehearing and no motion to amend having been filed or made in the Court of Appeals. Respondent objected to the proposed amendment (R. 166) and by order filed November 14, 1951, the District Court refused to permit the amendment (R. 168-169) and dismissed the suit pursuant to the mandate of the Court of Appeals.

The petitioners then appealed to the Court of Appeals for the Fifth Circuit, where, on the 14th day of January, 1953, that Court held that the appeal was from a judgment entered in execution of and in precise accord with its mandate, and the appeal presented nothing for review. The appeal was, therefore, dismissed by the Court of Appeals.

We have, therefore, a petition for writ of certiorari to this Court requesting review of a decision of the United States Court of Appeals for the Fifth Circuit rendered May 10, 1951, the petition for writ of certiorari being filed April 14, 1953. In other words, the petition is filed

one year and nine months after the entry of the judgment of the Court of Appeals.

As shown by the record, no attempt was made by petitioners to file a motion for a rehearing or a motion to amend the complaint in the Court of Appeals, which would have tolled the running of the Statute fixing the time within which a petition might be filed. Petitioners took no action until sixty days later when they filed in the District Court a motion to amend the original complaint. Certainly, this action did not and could not toll the running of the Statute insofar as the final order and judgment of the Court of Appeals is concerned, which finally and completely dismissed the complaint for lack of jurisdiction.

The order of the District Court, in refusing to allow the proposed amendment, only emphasizes the finality of the judgment of the Court of Appeals dismissing the case for lack of jurisdiction. Certainly, then, the action of the Court of Appeals on the 14th day of January, 1953 was proper when it held that there was nothing for it to pass on, since the order appealed from was simply a judgment entered in accordance with its mandate.

This, we submit, is perfectly clear; otherwise, plaintiffs could, in any case where the Court of Appeals has dismissed a suit and remanded it to the District Court, with proper instructions, offer to amend or attempt to amend and toll the running of the Statute. In such a situation the ninety day Statute herein quoted would be practically meaningless.

The judgment of the Court of Appeals entered on May 10, 1951 was a final judgment. That judgment left nothing further to be done, other than the ministerial act on the part of the Clerk of the District Court of entering an order in compliance with the mandate of the Court of Appeals. That judgment of the Court of Appeals has never been modified or set aside. Petitioners could have applied for writ of certiorari to review that judgment, provided they had filed such petition within the allotted time, but since they did not see fit so to do, this Court now lacks jurisdiction to consider such a petition, filed some 21 months after entry of said judgment.

We call to the attention of the Court the fact that the petition for writ of certiorari filed herein states that they request this Court

> "to review a final decision and decree of the United States Circuit Court of Appeals for the Fifth Circuit, . . . by which final judgment the said United States Circuit Court of Appeals for the Fifth Circuit affirmed a judgment of the United States District Court . . . dismissing said cause for lack of Federal jurisdiction. (R. 1 and 2).

We urge that this is not legally correct. The only final judgment of the Court of Appeals for the Fifth Circuit is dated May 10, 1951, and it vacated the judgment of the District Court, which had dismissed the case for failure to state a claim upon which relief could be granted. The Court of Appeals in plain and concise language instructed the District Court to dismiss the case for want of jurisdiction.

The only action taken by the Court of Appeals on January 14, 1953 was simply to state that the appeal presented nothing for their review, and was, therefore, dismissed. As is shown by the record, no mandate was issued by the Court of Appeals pursuant to the action taken on January 14, 1953, the only judgment of that Court being that the appeal be dismissed at the cost of the petitioners.

We submit that this last appeal was exactly what the Court of Appeals for the Fifth Circuit said it was: An appeal from the judgment of the District Court carrying out the mandate of the Court of Appeals. If this be true, then we fail to see how it can be successfully argued that the time in which a petition for certiorari might be filed has not expired.

The time for filing a petition for writ of certiorari begins to run from the date of the "order for mandate," or from "entry of the final judgment of the Court of Appeals to which the writ is issued." *Commissioner of Internal Revenue v. Bedford, 65 Sup. Ct. 1157, 325 U. S. 283, 89 L. Ed. 1611; Boylan v. United States, 42 Sup. Ct. 113, 257 U. S. 614, 66 L. Ed. 397; Matton Steamboat Company, Inc., et al., v. Murphy, 319 U. S. 412, 87 L. Ed. 1483; Cole v. Violette, et al., 319 U. S. 581, 87 L. Ed. 1599; Department of Banking v. Pink, 317 U. S. 264, 87 L. Ed. 254.*

The judgment of the Court of Appeals of May 10, 1951 was a final judgment, and the orders entered by the District Court and the Court of Appeals subsequent to that date added nothing, and the only issues presented for

review by the petition for writ of certiorari are those concluded by the judgment dated May 10, 1951.

II.

PETITIONERS DO NOT ASSIGN AS ERROR A CLAIM THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW THE PROPOSED AMENDMENT.

The petition for the writ of certiorari states that the questions presented for review are, in substance, as follows:

1. Does the United States District Court have jurisdiction to try this cause under the essential facts alleged?

2. Does the United States District Court have jurisdiction under the several Federal Statutes cited to try this cause?

3. Does the *Labor Management Relations Act, Title 29, U. S. C. A.*, give the District Court jurisdiction to try this cause? (Petition 11-12).

In other words, according to the petitioners, the sole question sought to be reviewed is whether or not the District Court has jurisdiction of this cause under the facts alleged in the complaint. Petitioners make no claim that the District Court abused its discretion in refusing to permit the amendment.

We submit that the questions presented by petitioners are the precise issues presented to the United

States Court of Appeals for the Fifth Circuit, and ruled on by that Court on May 10, 1951. We do not believe that counsel for petitioners will dispute this fact.

In the order of the District Court refusing to permit the proposed amendment, that Court stated that the proposed amendment added no new facts, and that it was bound by the decision of the Court of Appeals. Petitioners then appealed from that order of the District Court, and the appeal was dismissed by the Court of Appeals on the grounds that there was nothing for it to consider. Certainly, then, if this petition for writ of certiorari was timely filed, it could only be timely insofar as the action of the District Court in refusing to permit the proposed amendment is concerned. Yet, petitioners do not request review of the question of whether the amendment should have been allowed, but only requested this Court to review the question of whether the District Court had jurisdiction under the facts as alleged.

Under the Rules of this Court, grounds not assigned for review in a petition for writ of certiorari will not be considered. We submit that even should this Court hold that the order of the Court of Appeals on January 14, 1953, dismissing the appeal from the District Court was such action as to justify a petition for writ of certiorari, there are no grounds assigned in the petition which were passed on or adjudicated by the Court of Appeals. Therefore, the petition for writ of certiorari should be denied.

III.

THE ONLY ISSUE THAT CAN BE INVOLVED IS — DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE PROPOSED AMENDMENT?

If we are incorrect in the first two sections of this brief, and this Court holds that the petition for writ of certiorari was timely filed and that the petition adequately assigns as error the question of whether the trial Court abused its discretion in refusing to permit the proposed amendment, then, we submit, that the sole and only question which can be considered by this Court is: Did the trial Court abuse its discretion in so refusing to permit the proposed amendment?

Clearly, the decision of the Court of Appeals for the Fifth Circuit dated May 10, 1951, remanding this case to the District Court with instructions to dismiss it for want of jurisdiction was a final and conclusive judgment. Clearly, the Court of Appeals in that instant passed on the question of whether the District Court had original jurisdiction of the suit. No effort was made in the Court of Appeals to amend the complaint, and no motion for a rehearing was filed in the Court of Appeals. Clearly then the decision of the Court of Appeals, dated May 10, 1951, has become final and conclusive on the question of jurisdiction, on the allegations contained in the original complaint.

When petitioners offered to amend the complaint in the District Court, the only question presented was whether the amendment should be allowed. The District

Court in the exercise of its discretion refused to permit the proposed amendment. Petitioners appealed from this decision, which appeal involved nothing but a review of whether the trial Judge had abused his discretion.

The Court of Appeals dismissed this appeal, and the present petition for writ of certiorari is from this dismissal order of the Court of Appeals. Clearly, the only question that could properly have been raised in the Court of Appeals was whether the District Court abused its discretion in refusing to permit the proposed amendment. That then is the sole and only question that can be raised in the present petition for writ of certiorari.

We submit that the question of the original jurisdiction was ruled on by the Court of Appeals in its judgment dated May 10, 1951. That judgment has now become final. We, therefore, submit that the jurisdiction of the District Court cannot be presented by the present petition for writ of certiorari, and that the only question that could have been properly presented was and is—did the trial Court abuse its discretion in refusing to permit the proposed amendment?

IV.

THE ACTION OF THE DISTRICT COURT IN REFUSING THE AMENDMENT WAS A PROPER EXERCISE OF ITS DISCRETION.

We have subdivided this general subject into four separate divisions which we will now discuss in order.

A.

THE PROPOSED AMENDMENT OFFERS NO NEW FACTS BUT MERELY ADDS UNWARRANTED CONCLUSIONS OF LAW WHICH CANNOT BE USED AS A BASIS FOR JURISDICTION.

In the brief filed by petitioners in the Court of Appeals when this case was last presented there, we find the following statement: "That is to say that since this Court was of the opinion that the specific law as to which a controversy had arisen should be plainly set forth in the pleadings, the amendment was drawn for that purpose and that purpose only." Here petitioners were setting forth quite clearly that the sole and only purpose of the proposed amendment was to set forth the specific law or laws as to which a controversy had arisen. We submit that this was true. Not a single new fact was set forth or alleged in the proposed amendment.

There is a great difference between alleging facts conferring jurisdiction and simply alleging that the Court has jurisdiction under a particular Statute. It is a simple matter to make the formal allegations for the purpose of conferring jurisdiction upon a Federal Court, but these formal allegations must be substantiated by the facts before that Court actually has jurisdiction. This principle of law is well stated by Professor Moore in his book *Moore's Federal Practice, Volume 2, Page 1630*, as follows:

> "As can be seen, the formal allegation of jurisdiction is, as it should be, easy to set forth. It is, however, extremely important to remember

> that the general allegations of jurisdiction contained in Official Form 2(b) *must* be borne out by the claim, well pleaded, which follows."

This principle of law is well settled, one of the leading cases being *Louisville & Nashville Railroad Company v. Mottley (1908), 211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126*, wherein the Court stated as follows:

> "There was no diversity of citizenship, and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a 'suit . . . arising under the Constitution or laws of the United States.' It is the settled interpretation of these words, as used in this Statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."

In the case of *Package Closure Corporation v. Sealright Company (1943), 4 F. R. D. 114*, plaintiff filed suit alleging a violation of the *Sherman Anti-Trust Act*, and defendant moved to dismiss for want of jurisdiction. The Court in its opinion stated that the complaint alleged numerous conclusions of law to the effect that the *Sherman Anti-Trust Act* had been violated, but that the conclusions of law could not be considered when tested by a motion to dismiss unless such conclusions were substantiated by allegations of fact. In its opinion, the Court stated as follows:

> "Prior to the adoption of the new Rules of Civil Procedure it was well settled that in testing the sufficiency of a pleading (for example, on demurrer), the objector was entitled wholly to disregard conclusions unless supported by well pleaded facts." (Numerous Supreme Court decisions are cited in support of this statement).

In the case of *Pacific States Box & Basket Company v. White, 296 U. S. 176, 56 S. Ct. 159, 80 L. Ed. 138*, the Supreme Court again held that the plaintiff had not sustained the burden of stating jurisdiction "by making allegations which are merely the general conclusions of law or facts . . . Facts relied upon to rebut the presumption of constitutionality must be specifically set forth . . . A motion to dismiss like a demurrer admits only facts well pleaded."

In the case of *Flanagan v. Security First National Bank, 41 Fed. Supp. 77*, the Court stated as follows:

> "The proper motion to attack a complaint is by motion to dismiss. A motion to dismiss admits all the allegations of fact, which are material and relevant, alleged in the complaint but does not admit arguments, inferences or legal conclusions. Such a motion performs the function formerly performed by a demurrer."

In the case of *Kowalesky v. Pennsylvania Railroad Company (1939), 193 Fed. (2d) 827*, the District Court refused to permit plaintiffs to amend their complaint on the ground that the complaint would still have been de-

fective should the amendment be allowed. Plaintiffs had sought to amend the complaint so as to allege that the action of the defendant had been wanton and willful. The Court acknowledged that if the action of the defendant had been wanton or willful then a cause of action would have been stated. The Court held, however, that from the facts set out in the complaint it was apparent that the action of the defendant had not been wanton or willful and that the legal conclusion set out in the proposed amendment was not justified by the facts. This case was affirmed by the Court of Appeals.

This principle of law was recently reaffirmed by the United States Court of Appeals, 7th Circuit, in the case of *United Protective Workers of America, Local No. 2 v. Ford Motor Company*, decided March 14, 1952, *194 Fed. (2d) 997*. In this case, the Court was concerned with the request by plaintiff's for injunctive relief which had been denied by the District Court. In this connection, the Court stated as follows:

> "The authorities are not in agreement on whether the Norris-LaGuardia Act deprives the District Courts of the power to grant injunctive relief in a case such as this. The authorities do agree, however, that injunctive relief may never be granted where the plaintiff has an adequate remedy at law. To be entitled to injunctive relief the plaintiff must plead, and has the burden of proving facts which show, that he has no adequate remedy at law. While the complaint states that the plaintiffs here 'have no other adequate remedy at law,' no facts to sustain this conclusion are

pleaded. It would seem clear that an action for damages against Ford for a breach of his contract would provide Orloski an adequate remedy. If for some reason not aparent this is not true, the facts showing such reason should have been pleaded."

We submit that the principle involved in the *Kowalesky* case, *supra*, and the *Ford Motor Company* case, *supra*, is the identical principle involved here. The conclusions of law set out in the proposed amendment are not justified or warranted by the facts set out in the bill of complaint. None of the facts alleged in the bill of complaint will be changed or added to under the proposed amendment, and the Court of Appeals in its previous decision in this case, has already held that these facts do not confer jurisdiction upon the Federal Courts. This was stated in no uncertain terms by Justice Borah in the former appeal of this case, as follows:

"Viewing the case at bar against this background of established principle, we do not find in it the elements of federal jurisdiction. What is here involved is merely a controversy between the parties as to the construction of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but only arises from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship.

Barnhart v. Western Maryland Ry. Co., 128 F. (2d) 709." (See, *189 F. (2d) 219*).

We submit that since the proposed amendment would add no new facts, and the Court of Appeals had already ruled that the facts in the complaint did not establish jurisdiction in the Federal Court, which judgment had become final, then the District Court was entirely proper in refusing to permit the proposed amendment.

B.

THE ALLEGATIONS CONTAINED IN THE PROPOSED AMENDMENT WERE PASSED ON AND REJECTED BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, IN A JUDGMENT WHICH HAS BECOME FINAL.

The only argument advanced by petitioners in connection with this point is that while the original bill of complaint alleged the application of the *Taft-Hartley Law* "*inferentially*," the proposed amendment specifically alleges the application of this *Act*, and more particularly *Section 185(a), Title 29, U. S. C. A.*

Section 185, Title 29, U. S. C. A. (Taft-Hartley Law) became effective on August 24, 1947. The alleged breach complained of by petitioners occurred, if it occurred at all, on or before May 20, 1947, at which time all members of plaintiff Union went out on strike. It is now uniformly held that this law created substantive rights, is not retroactive, and that it confers no jurisdiction on Federal Courts concerning contract violations which occurred

prior to its enactment. *Wilson & Company v. United Packing House Workers of America, 83 Fed. Supp. 162; Colonial Hardwood Flooring Co., Inc., v. International Union, United Furniture Workers of America, 76 Fed. Supp. 493; Amazon Cotton Mill Company v. Textile Workers Union of America, 167 Fed. (2d) 183; Schatte v. International Alliance, 182 Fed. (2d) 158; Studio Carpenters Local Union v. Loew's, Inc., 182 Fed. (2d) 168; MacKay v. Loew's, Inc., 182 Fed. (2d) 170;* (for discussion of this principle see *17 A. L. R. (2d) 620).*

While appellants in their last brief before the Court of Appeals on this point mention only the *Taft-Hartley Law*, the proposed amendment sets out other Statutes which, it is alleged, confer jurisdiction upon the District Court. These additional Statutes are: (1) *Sections 101-115*, inclusive, *Title 29, U. S. C. A.*, known as the *Norris-LaGuardia Act;* (2) *Sections 151-166*, inclusive, *Title 29, U. S. C. A.*, known as the *Wagner-Connerly Act.*

We make the above observation because exactly the same contentions were made to the Court of Appeals in the previous hearings on this bill of complaint that are asserted in the proposed amendment. As an instance of this, we quote (with omissions) from pages 38 and 39 of the brief filed by appellants in that Court when this case was previously presented there, (case No. 13,388 on its docket) which quote is as follows:

> "Having in mind the declared policy and purposes of Congress in the enactment of the various Statutes (The Norris-LaGuardia Act, the Wagner-Connerly Act, the Railway Labor Act, the

Taft-Hartley Act) as well as the establishment of the Federal Conciliation Service and the Mediation Board, the position taken by the appellants here is plain:

> "The contract here sued upon is more than a simple contract; it is founded upon principles announced by the Statutes of the United States, and was entered into under the protection of the guaranties contained in those Statutes . . . If either of the parties to a contract refuses or fails to use every available means of reaching agreement, that party violates not only its contractual obligation, but its duty under the law, and the Courts of the United States will enforce the proper remedy . . . This breach of the contract gave rise to a cause of action which may be determined by the Courts of the United States."

From the very inception of this case every allegation of fact and every Statute set out in the proposed amendment has been advanced by the petitioners. Each of these questions were briefed by this respondent, both before the District Court and before the Court of Appeals, and, as is shown by the above quoted excerpt from petitioners' brief, was advanced and urged by petitioners. The Court of Appeals heard and considered these arguments, as indicated by the opinion of Judge Borah. We have previously quoted from this opinion and will not repeat the quotation here. However, we would like to call the Court's attention to the fact that Judge Borah, in addition to stating as previously quoted, pointed out that, in the companion suit to this case, Cause No. 13,940,

wherein a mandatory injunction is sought, no facts were alleged which might give the Court jurisdiction under the *Federal Arbitration Act.* This was done although the bill of complaint in said Cause No. 13,940 was identical to the bill of complaint in this cause insofar as the jurisdictional allegations were concerned, and no specific mention was made of, nor reference to, the *Federal Arbitration Act.*

What we are trying to emphasize here is the fact that every contention made by petitioners in the proposed amendment has previously been advanced before the Court of Appeals and the District Court, and has been ruled on by the Court of Appeals, which judgment has long since become final. The record and the briefs show this conclusively.

In addition, by dismissing the last appeal, the Court of Appeals quite clearly held that nothing was presented by the proposed amendment that had not already been passed on by it. Thus the action of the District Court in refusing to permit the proposed amendment was entirely proper.

C.

SHOULD THE PROPOSED AMENDMENT BE ALLOWED THERE IS STILL NO FEDERAL JURISDICTION STATED, AND, THEREFORE, THE ACTION OF THE DISTRICT COURT IN REFUSING THE AMENDMENT WAS PROPER.

If the bill of complaint, together with the proposed amendment, does not contain the necessary allegations to confer jurisdiction upon the Court, then the proposed amendment should not be permitted. The authorities on

this question are uniform, and for the sake of brevity we will cite only a few of them.

Professor Moore in his textbook *Moore's Federal Practice, Volume 3, 2nd Edition, Paragraph 15.09, page 837,* states as follows:

> "If it is clear that the amendment cannot cure the lack of jurisdiction, denial of leave to amend is in order."

Again, in *Paragraph 15.10, page 538 of Moore's Federal Practice, Volume 3, 2nd Edition,* Professor Moore says:

> "The allowance of an amendment after dismissal, however, lies within the discretion of the trial Court, and the Court may properly deny leave to amend where plaintiff has had several opportunities to state a claim and has not been able to do so, or where the proposed amendment would not remedy the deficiencies of the original pleading."

In the case of *Kowalesky v. Pennsylvania Railroad Company (1939), 103 Fed. (2d) 827,* the Court stated as follows:

> "The Court below, therefore, did not err in refusing plaintiff leave to amend his complaint by averring in paragraphs 4 and 5 that the negligence of the defendant was wanton and willful. The complaint if thus amended, would not have stated a cause of action."

In the case of *Stephens v. Reed (1941), 121 Fed. (2d) 696,* plaintiff sought to amend his complaint, and the

Court of Appeals held that the District Court was within its discretionary powers when it refused to permit the proposed amendment, stating as follows:

> "There can be no abuse when what is refused would avail the offeror nothing if allowed. See Wilson v. Lamberton, 102 F. (2d) 506, 507."

In the very recent case of *Studio Carpenters Local Union No. 946 v. Loew's, Inc., 182 Fed. (2d) 168*, at *page 170*, the Court states as follows:

> "Appellant also complains of the denial of permission to make certain minor amendments to the amended complaint. Since, under our decision, the proposed amendment would not have cured the defective pleading, the error, if any, was harmless."

We, therefore, submit that under the authority of these cases, and we have found none to the contrary, if it would be futile and useless to permit plaintiffs to amend the bill of complaint as set out in the proposed amendment, the District Court was correct in the exercise of its sound discretion, in refusing to permit the amendment.

There is the additional factor, however, that even if the proposed amendment were allowed, there would still be no federal jurisdiction stated, and we take this opportunity of briefly reviewing the jurisdictional questions raised in connection with this case.

The proposed amendment sets out that the claim asserted in the bill of complaint involves the *Norris-LaGuardia Act*, the *Wagner-Connerly Act* and the *Labor-*

Management Relations Act. The proposed amendment then concludes that "this Court therefore" has jurisdiction to hear this cause of action by reason of the provisions of *Section 1331* and *Section 1337, Title 28, U. S. C. A.* and *Section 185, Title 29, U. S. C. A.*

Section 1331, Title 28, U. S. C. A., provides that District Courts shall have original jurisdiction where the matter in controversy exceeds the amount of $3,000, exclusive of interest and costs, and arises under the *Constitution*, laws or treaties of the United States. *Section 1337, Title 28, U. S. C. A.*, provides, in substance, that the District Courts shall have original jurisdiction where the action or proceeding arises under any Act of Congress regulating commerce or protecting commerce against restraints or monopoly. These are both general grants of jurisdiction to the Federal District Courts and have been briefed and argued before the District Court and the Court of Appeals with respect to their applicability to this bill of complaint.

In the former appeal of this cause, *supra*, the Court of Appeals decided the issue and in its opinion stated:

> "Viewing the case at bar against this background of established principle, we do not find in it the elements of federal jurisdiction. What is here involved is merely a controversy between the parties as to the construction of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but only arises from the subsequent contract-

ual relations of the parties. The wrongful breach of such relations does not confer Federal Court jurisdiction unless there is diverse citizenship. Barnhart v. Western Maryland Ry. Co., 128 F. (2d) 709."

The established principle that Judge Borah was talking about is set out in his opinion. He cited numerous cases, among them being the case of *Gulley v. First National Bank, 299 U. S. 109.* The established principle is, in effect, as stated by Justice Cardozo in the *Gulley* case and quoted by Judge Borah in his opinion, as follows:

> "'How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books. Some tests are well established. To bring a case within the Statutes, a right of immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. Starin v. New York, 115 U. S. 248, 257, 6 S. Ct. 28, 29 L. Ed. 388; First National Bank v. Williams, 252 U. S. 504, 512, 40 S. Ct. 372, 374, 64 L. Ed. 690. The right of immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. Ibid; King County v. Seattle School District, 263 U. S. 361, 363, 364, 44 S. Ct. 127, 128, 68 L. Ed. 339.'"

We feel that it is unnecessary to unduly lengthen this brief with further citations on this point. Merely to allege that there is a substantial controversy concerning

the construction and effect of certain laws of the United States governing interstate commerce is not sufficient. The facts alleged in support of the cause of action must warrant such a conclusion of law. This is clearly a fundamental and established principle which has been definitely settled insofar as this bill of complaint is concerned.

Section 185, Title 29, U. S. C. A., is that section of the *Taft-Hartley Law* providing that certain suits for violation of contract between an employer and a labor organization may be brought in the District Courts of the United States having jurisdiction of the parties. The applicability of this *Act* was briefed and presented to the District Court when it was first argued on April 5, 1948. It was presented by brief and argument to the Court of Appeals on the first appeal of this case. It was presented by brief and argument to the District Court when the jurisdictional motion was first argued there. It was again presented to the Court of Appeals by both brief and argument on the second appeal. Petitioners have made the same contentions since the very inception of this suit that they are attempting to make in the proposed amendment. Nothing new has been added except that their contentions are now specifically put in the pleadings, and the Courts have uniformly held that it has no application to this cause of action. The complaint alleges a breach of contract which occurred, if it occurred at all, on or before May 20, 1947, at which time all members of the plaintiff Union went on strike. The effective date of this section of the *Taft-Hartley Act* was August 24, 1947, several months after the alleged breach of contract.

The allegation that this was a continuing breach was made in the original bill of complaint and is merely reasserted again in the proposed amendment. This point was argued to the District Court and to the Court of Appeals. However, it was discarded by the Courts. This question of a "continuous breach" was taken up and discussed by Judge Orr in the case of *Schatte v. International Alliance of Theatrical Employees and Moving Picture Machine Operators of the United States and Canada, et al., (1950), 182 Fed. (2d) 158.* In that case Judge Orr said that the period of limitations on an action by an employee under a contract of employment generally runs from the time the employee was discharged or refused employment. He further points out that it is the general rule that the employee who is discharged in violation of his contract of employment may sue only once and at that time recover all present and prospective damages. He, therefore, rejected any theory of a continuous breach in a situation almost identical to that alleged in the bill of complaint. This case was appealed to the Supreme Court of the United States and certiorari was denied. Other cases with identical holdings are *Studio Carpenter's Local Union v. Loew's, Inc., (1950, C. A. 9th), 182 Fed. (2d) 168,* certiorari denied *340 U. S. 828, 95 L. Ed. 608, 71 Sup. Ct. 64,* and *MacKay v. Loew's, Inc., (1950, C. A. 9th), 182 Fed. (2d) 170,* certiorari denied, *340 U. S. 828, 95 L. Ed. 608, 71 Sup. Ct. 65.*

This argument was advanced before the Court of Appeals on a former appeal of this case, and was discussed at length by both parties. It was rejected by that Court, and its judgment has long since become final.

We earnestly contend that, since the proposed amendment would not cure the defective complaint, so as to show jurisdiction in the District Court, even should it be permitted, the District Court was entirely proper in refusing to permit it.

D.

EQUITY DEMANDS THAT THE PROPOSED AMENDMENT BE DENIED.

We take this opportunity, in concluding this brief, of pointing out the equities involved in this case. During the four years in which this case was being litigated, petitioners at no time offered to amend so as to show specifically the Statutes on which they relied for jurisdiction. This was true even though respondent filed its motion to dismiss for lack of jurisdiction at the very outset of this litigation. In fact, after the dismissal by the Court of Appeals for lack of jurisdiction on the last appeal, petitioners declined to move for leave to amend in that Court, but waited almost sixty days after the decision of that Court, and then filed their motion in the District Court, requesting permission to amend.

One of the primary rules in this connection is the very rule cited by petitioners as the basis for their motion for leave to amend, to-wit: *Section 1653, Title 28, U. S. C. A.*, which is as follows:

> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate Courts."

The District Court had already dismissed this case for failure to state a cause of action, and, should petitioners have been permitted to amend the complaint so as to state jurisdictional grounds, and the case had then been sent back to the District Court, then the District Court would have no alternative but again to dismiss the complaint for failure to state a cause of action. Clearly, one of the primary purposes of *Section 1653, Title 28, U. S. C. A.*, was to prevent just such a situation as this, and the parties are given the right to request from the appellate Courts the right to amend defective allegations of jurisdiction. It would have been quite easy for petitioners to have requested this permission from the Court of Appeals, and, under the circumstances, that Court would certainly have considered the matter, since it would have resulted in a tremendous waste of time, energy and expense to send the case back to the District Court for want of jurisdiction if the necessary grounds for jurisdiction could have been asserted by the petitioners, since the District Court had already ruled that the bill of complaint did not state a cause of action.

Certainly, respondent is entitled, as a matter of fairness, to have this litigation terminated as soon as practical, and the failure on the part of petitioners to take advantage of the provisions of our federal procedure specifically designed to expedite the hearing of causes, is, we submit, extremely important. It is sufficient, we submit, in and of itself, to justify the refusal to permit the proposed amendment.

The fact that a suit of this kind remains in Court for more than four years (now nearly six years) is a hardship, and is a handicap to defendant's business operations.

Petitioners could have asked leave to amend in the District Court, when respondent first raised the question of jurisdiction. They did not see fit to do so.

Petitioners could have asked the Court of Appeals for leave to amend at the time of the first appeal. No such request was made.

On remand to the District Court, where we again urged lack of jurisdiction, petitioners could have amended their complaint. But no, they would rather wait.

On the second appeal, before or after judgment, petitioners could have asked permission to amend. Again they took no steps to cure their defective pleadings.

Finally, and at long last, and more than four years after filing, petitioners asked to be permitted to amend, and to make claims in the complaint that have been briefed, argued and decided on prior hearings.

CONCLUSION.

We submit to your Honors that this application for a writ of certiorari should be denied for the following reasons:

A. It was not timely filed, and hence, this Court does not have jurisdiction.

B. Applicants failed to claim that the trial Court abused its discretion in refusing to allow the proposed amendment.

C. If the application was timely, and if the Court has jurisdiction, then the only issue that could properly be considered is—did the trial Court abuse its discretion when it refused to allow the proposed amendment?

D. The refusal of the District Court to allow the amendment was a proper exercise of its discretion.

We submit to your Honors that the action of the District Court in refusing to allow the amendment was proper for the following reasons:

A. The proposed amendment contained no new allegations of fact, but merely unwarranted conclusions of law that could not serve as a basis for jurisdiction.

B. All the allegations contained in the proposed amendment had previously been passed upon by the Court of Appeal for the Fifth Circuit in a judgment which has long since become final.

C. The complaint, with the proposed amendment, fails to show federal jurisdiction.

D. Equity demands that the proposed amendment be not allowed.

WHEREFORE, respondent prays that the application be denied.

Respectfully submitted,

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CERTIFICATE.

I, Carl B. Callaway, of counsel for respondent, do hereby certify that I have mailed, postage fully prepaid, a true copy of the foregoing brief to opposing counsel of record on this the _____ day of May, 1953.

CARL B. CALLAWAY,
Of Counsel for Respondent.

No. 717

Supreme Court of the United States

OCTOBER TERM, 1952

FILED
APR 14 1953
HAROLD B. WILLEY, C

(CCA No. 13,940)

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY, AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ETC., ET AL.,

Petitioners,

versus

SOUTHERN BUS LINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

(CCA No. 13,940.)

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY, AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ETC., ET AL.,

Petitioners,

versus

SOUTHERN BUS LINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the United States:

NOW COME Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division No. 1127, etc., et al., petitioners herein, and most respectfully pray this Honorable Court that a *Writ of Certiorari* be issued to review a final decision and decree of the United States Circuit Court of Appeals for the Fifth Circuit, rendered in a certain case pending in said United States Circuit Court of Appeals, num-

bered 13,940, and styled Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division No. 1127, etc., et al., appellants, now petitioners herein, against Southern Bus Lines, Inc., appellees, now respondent herein, by which final judgment the said United States Circuit Court of Appeals for the Fifth Circuit affirmed a judgment of the United States District Court for the Southern District of Mississippi, Hattiesburg Division, rendered against these petitioners and in favor of said respondent dismissing said cause for lack of Federal jurisdiction.

Summary and Statement of Matters Involved.

Jurisdiction of the Federal Court is predicated upon the provisions of the Norris-LaGuardia Act, Title 29, USCA, Sections 101-115, inclusive; The National Labor Relations Act, Title 29, USCA, Sections 151-166, inclusive, and the Labor Management Relations Act, Title 29, USCA, Sections 141-197, inclusive, in that:

(a) The Federal Court, by virtue of its general equity powers, has authority to grant the relief prayed for under the general provisions of the Norris-LaGuardia Act and the National Labor Relations Act, above cited.

(b) That the Respondents herein committed acts constituting a breach of the contract sued upon, both prior and subsequent to the effective date of the Labor Management Relations Act, so that the procedural remedies specifically created by that Act, Title 29, USCA, Sec-

tion 185(a), are available to these petitioners in the Federal Courts.

Briefly the facts are these: Effective May 16, 1946, the Union and the Company entered into a contract of employment by which contract it was provided (Record page 61):

> "This agreement shall take effect as of May 16, 1946, and shall remain in effect until May 16, 1947, and thereafter from year to year unless terminated or modified as herein provided."

It contained also the following provision:

> "The Company agrees to meet and treat with the duly accredited officers and committees of the Association on all questions or differences relating to hours, wages, and working conditions which may arise under the terms and conditions of this contract . . .
>
> "In the event of a failure to reach a mutually satisfactory adjustment through such oral hearing of any such question or difference within twenty days from the date of the Company's written answer, the same shall, upon written request of either party to this agreement, made within ten (10) days thereafter, be submitted to a Board of Arbitration selected in the following manner:
>
> "The Company shall choose one Arbitrator, and the Association shall choose one Arbitrator, and if the two so chosen cannot enter upon a mutually satisfactory adjustment within a period of fifteen (15) days after the selection of the second arbitrator, they shall immediately select a third arbitrator. In the

> event, however, said arbitrators chosen by the Company and the Association fail to agree upon a third arbitrator within forty-eight (48) hours, the Director Conciliation Service, U. S. Department of Labor, shall be requested forthwith to appoint said third Arbitrator . . ." (Record pages 9-10.)

On April, 14, 1947, the Union notified the Company (Rec. page 62):

> "We are hereby serving notice of our desire to enter into negotiations for changes in the agreement".

Negotiations were begun between the Company and the Union's representatives looking to changes in the agreement, and such negotiations continued past the initial terminal date of the agreement, which by reason of the automatic renewal clause therein, continued in effect *verbatim,* for such time as no changes were or might be put into effect as a result of these negotiations or by arbitration under the terms of the contract. Both parties recognized his fact, as was evidenced by continued negotiations relative to changes, as well as the fact that the employees continued working at the same rates of pay and under the same conditions as provided for by the contract, until it was apparent that no agreement would be reached through such negotiations; whereupon the Union requested that the entire matter of proposed changes be submitted to arbitration under the Arbitration clause of the contract. Upon being advised by the Company that it would not submit these differences to arbitration, a strike was called by the Union, effective May 20, 1947, for the purpose of inducing the Company

to submit the differences which had arisen, to arbitration as provided by the contract.

At the time the strike action was taken by the Union, the Labor Management Relations Act, known as the Taft-Hartley Law, had not been enacted by Congress. That act was adopted on June 23, 1947, effective August 23, 1947.

On November 10, 1947, suit was filed in the United States District Court for the Southern District of Mississippi, Hattiesburg Division, seeking damages by way of recovery of wages due the striking employees under the existing contract. On December 20, 1947, this suit based on the same facts, (Rec. pages 3-74) seeking a mandatory injunction to compel arbitration under the terms of the contract was filed in the same District Court. The first cause is here referred to because an identical petition for *Writ of Certiorari* in that cause is filed concurrently with this petition involving identical questions. Both cases were tried simultaneously by the District Court and the appeals therein passed on at the same time by the United States Circuit Court of Appeals for the Fifth Circuit. All proceedings in both causes were the same and identical opinions and orders were rendered therein by the Circuit Court of Appeals. The companion case is numbered 13,939, United States Circuit Court of Appeals for the Fifth Circuit, and all arguments made herein, are applicable to that cause also.

When the suits were originally filed in the District Court, the Respondent moved the Court to dismiss them for the following reasons:

(a) for lack of venue and on the ground of *forum non conveniens.*

(b) for lack of jurisdiction of the parties and the subject matter.

(c) for failure to state a cause of action.

The District Court thereupon dismissed said causes for lack of venue, and on the ground of *forum non conveniens.* (Record, pages 100-102.) The opinion of the Court is embodied in the order of dismissal.

On appeal to the Circuit Court of Appeals for the Fifth Circuit, this judgment of the District Court was reversed, the opinion of the Court being reported in 172 Fed. 2d. 946. A copy of that opinion appears as Appendix "A" to this petition.

At a subsequent hearing by the District Court after remand, the District Court considered only two questions which had been raised by the Respondent and dismissed this cause for the reasons, as adopted by the District Court, that (Record page 110):

> "Nowhere in the complaint filed in the cause is there a reference to any statute or law authorizing the Court to grant the relief prayed for, which amounts to specific enforcement of the alleged agreement to arbitrate. In the absence of any such statute it must be assumed that the complaint was drawn under the assumption that the Court had the authority to grant the relief prayed for under the common law."

And further (Record page 117):

"With no right of action under the common law, and none under a Statute of the United States, plaintiffs must find statutory rights in Mississippi or suffer the dismissal of their suit."

The entire opinion of the District Court in dismissing this cause is set out at pages 110-126 of the Record, and the order of the Court in conformity therewith appears at pages 126-127 of the Record.

The companion case was also dismissed by the District Court.

On appeal to the Circuit Court of Appeals from this second order of the District Court, the two questions above referred to, upon which that order was based, were not considered by the Appellate Court, which remanded the causes to the District Court with direction to dismiss for lack of jurisdiction. The opinion of the Fifth Circuit Court of Appeals is reported in 189 Fed. 2d 219, a copy of which appears as Appendix "B" to this petition. Copy of the opinion in the companion case appears as Appendix "C".

After remand, petitioners herein moved to amend their original bill of complaint, as shown by proposed amendment (Record pages 151-153). The District Court held that the motion was timely made, but that it contained no additional jurisdictional facts not already considered by both the District Court and the United States Circuit Court of Appeals; that the District Court was bound by the direction of the Circuit Court of Appeals to dis-

miss both cases, and, accordingly, same were dismissed. The order of the District Court appearing at pages 156-157 of the Record.

From this order an appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed the action of the District Court and dismissed the cases on January 14, 1953. A copy of the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, dismissing this cause and the companion case, appears as Appendix "D" to this petition, the decision being reported in Volume 201, Fed. 2d. 53.

Jurisdiction of the Court.

1.

Jurisdiction of this Court arises under Title 28, USCA, Section 1254, which provides in part:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

2.

The judgment of which review is sought is a final judgment by the United States Circuit Court of Appeals for the Fifth Circuit.

3.

The judgment sought herein to be reviewed became final on January 14, 1953.

4.

The federal question of substance which petitioners claimed in and which was denied by the United States Circuit Court of Appeals is:

(a) Under Title 29, USCA, Sections 101-115, inclusive, and Title 29, USCA, Sections 151-166, inclusive, known respectively as the Norris-LaGuardia Act and the Wagner-Connery Act, certain substantive rights were guaranteed to members of labor organizations engaged in an industry affecting commerce, relating to organization, collective bargaining, and the right to strike. These enactments are in mandatory language and absolutely require compliance therewith by the employer as well as the employee. The rights guaranteed to the employees are rights arising under the laws of the United States. The contract here is not a simple contract between individuals, but is a contract controlled by the mandatory provisions of the laws of the United States above referred to, enacted by Congress as a matter of public concern; and where the contract was violated, as charged in the bill of complaint, the federal courts, by virtue of their general equity powers, have jurisdiction to enforce the proper remedy, even in the absence of a specific provision to that effect.

(b) Title 29, USCA, Section 185 (a) which is a part of the Labor Management Relations Act enacted on June 23, 1947, effective August 23, 1947, provides that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, may be brought in the District Court of the United States having jurisdiction of the parties. The refusal of the Company to comply with the terms of the contract was a continuing violation thereof, beginning in May, 1947 and continuing up to the date of the filing of these suits, one on November 10, 1947, and the other on December 20, 1947; and because of such continuing violation past the effective date of the Taft-Hartley Act, otherwise known as the Labor Management Relations Act, jurisdiction to try these causes was vested in the Federal Courts by virtue of Title 29, Section 185 (a), USCA, above referred to.

(c) The proposed amendment to the original bill of complaint, disallowed by the Court below (R. pages 151-153), alleges affirmative acts by the employer in violation of the contract, after the effective date of the Taft-Hartley Law, in that negotiations relative to the contract were carried on subsequent to that date, and that Respondent refused during all of that time to comply with the terms of the contract, and because of such violation of the subsisting contract, after the effective date of the Labor Management Relations Act, the Federal Courts are vested with jurisdiction to try these suits for violation of the contract, as provided by said Section 185 (a), USCA, Title 29.

The Questions Presented.

The following questions are hereby presented for review:

1. The question presented is one of jurisdiction, to-wit, does the United States District Court have jurisdiction under the law to try this cause under the essential facts alleged?

2. Does the United States District Court have jurisdiction either under the Norris-LaGuardia Act, Title 29, USCA, Sections 101-115, inclusive; the National Labor Relations Act, Title 29, USCA, Sections 151-166, inclusive; or the Labor Management Relations Act, Title 29, USCA, Sections 141-197, inclusive, to try these causes as filed?

3. Where the complaint alleges facts showing the present existence of a contract of employment negotiated by a labor union with an employer engaged in industry affecting commerce, such contract having been negotiated and made effective prior to the effective date of the Labor Managment Relations Act, and further alleges that both prior and subsequent to the effective date of that Act the employer, during negotiations relative to said contract, refused to arbitrate differences arising thereunder, in conformity with a specific provision therein for arbitration of such differences, and such allegations are not denied, does the Federal Court have jurisdiction, either under the laws antecedent to the Labor Management Relations Act, or under that Act, of a suit for wages due under the contract, and of a suit to compel arbitration of those differences according to the terms of the contract?

Reasons Relied Upon For The Allowance Of The Writ.

1. The decision in this case by the Circuit Court of Appeals involves a question of Federal jurisdiction which is of general importance, and which has not, but should be, settled by this Court.

2. The question of jurisdiction and venue under the Labor Management Relations Act in a cause involving the violation of a pre-existing contract, or the continuing violation of such a contract, is an important question of Federal law which has not been but should be determined by this Court.

3. Where the Circuit Court of Appeals dismisses a cause because of lack of Federal jurisdiction, the aggrieved party has an inherent right to have this Court determine the question of Federal jurisdiction *vel non*.

Decisions supporting petitioners' request for *Writ of Certiorari* on these grounds, are:

Brooklyn Sav. Bank vs. O'Neill, 65 S. Ct. 895; 324 U. S. 697, 89 L. ed. 1296.

Del Vecchio vs. Bowers, 56 S. Ct. 190, 296 U. S. 280, 80 L. ed. 229.

Ex Parte Lau Ow Bew, 12 S. Ct. 43, 141 U. S. 583, 35 L. ed. 868.

Prayer.

Your petitioners respectfully submit that the *Writ of Certiorari* shall issue to the United States Circuit Court of Appeals for the Fifth Circuit in said cause to the end that this Court may review said cause and same may be determined by this Court, as provided by law, and that your Petitioners may have such other and further relief or remedy in the premises as the Court may see appropriate and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Honorable Court.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

A concise statement of the case is set forth in the foregoing petition under the heading "Summary and Statement of Matters Involved," and in the interest of brevity, is adopted here by reference. Appendices to the Petition contain all opinions and orders of the Court below and the District Court, other than those which appear in the Record.

Specifications of Error.

Under "JURISDICTION OF THE COURT," Section 4, Subsections (a), (b) and (c), and under "THE QUESTIONS PRESENTED," petitioners have set out their contentions as to Federal jurisdiction of this cause, and the companion cause, and they are, briefly, as follows:

1.

The Federal Court, by virtue of its general equity powers, has authority to grant the relief prayed for.

2.

The Federal Court has jurisdiction to try this cause by virtue of Section 185 (a) USCA, Title 29, which reads as follows:

> "Section 185. Suits by and against labor organizations—Venue, amount, and citizenship.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

ARGUMENT AND AUTHORITIES.

Specification of Error No. 1.

It is essential in considering this phase of Petitioners' contention, to keep in mind the announced policy of Congress in the enactment of the various statutes dealing with the employer-employee relationship and affecting commerce, including those statutes herein specifically relied upon, and the impact of those statutes upon the rights of employers, employees, and the public welfare. That policy was first announced in Section 102, Title 29, USCA, which is a part of the Norris-LaGuardia Act of 1932, and reads as follows:

"Section 102. Public Policy in labor matters declared.

"In the interpretation of Sections 101-115 of this title and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in such sections, the public policy of the United States is declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority

for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, Sec. 2, 47 Stat. 70."

In 1935, when the National Labor Relations Act was enacted, Congressional intent and policy was announced in Section 151, Title 29, USCA, in the following language:

"The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of com-

merce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to miti-

gate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and cnnditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, Sec. 1, 49 Stat. 449."

Thereafter, by Section 157, Title 29, USCA, being a part of the National Labor Relations Act, it was provided as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. July 5, 1935, c. 372, Sec. 7, 49 Stat. 452."

Section 151, Title 29, USCA, *supra*. was carried forward and included in the Labor Management Relations Act in the same volume and under the same section number.

Both the National Labor Relations Act and the Labor Management Relations Act preserved the right to strike. Section 163, Title 29, USCA.

It is apparent from the foregoing that contracts of employment in industries affecting commerce, and the refusal of either of the parties to abide by the terms of such contracts, were recognized by Congress as matters

of great public concern. It seems to be an inescapable conclusion that where either party refuses to comply with the plain mandate of these laws, or violates a contract of employment entered into under the provisions of such laws, such refusal or violation is a proper subject for inquiry by the Federal Courts. In fact, this Court has so determined, as we believe, in the following cases:

Virginian Ry. Company vs. System Federation No. 40, 300 U. S. 515, 61 L. ed. 769.

Texas & N. O. R. Co. vs. Brotherhood Ry. & S. S. Clerks, 281 U. S. 548-571, 74 L. ed. 1034.

Brotherhood of R. Trainmen vs. Toledo, Peoria and W. R. Company, 321 U. S. 50, 88 L. ed. 534, 64 S. Ct. 413.

Many authorities supporting this contention are collected and cited in the opinions of this Court in the foregoing cases.

Respondent's contention herein is that the contract sued on is a simple contract, enforceable only under the laws of the State where made, and this contention was adopted by the Circuit Court of Appeals for the Fifth Circuit, when it stated: (Opinion, Appendix B):

> "What is here involved is merely a controversy between the parties as to the construction of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but arises from the subsequent contractual relations of the parties. The wrongful breach of such re-

lations does not confer Federal Court jurisdiction unless there is diverse citizenship."

We submit that that statement by the Fifth Circuit Court of Appeals is in direct opposition to the declared purposes of Congress in enacting the labor legislation herein referred to, and is contrary to all the decisions by this Court in passing on such enactments. As stated by this Court in the case of *Virginian Ry. Company vs. System Federation* No. 40, *supra:*

> "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern . . . .
>
> "The decree is authorized by the statute and was granted in an appropriate exercise of the equity powers of the Court."

Specification of Error No. 2.

The Labor Management Relations Act was enacted by Congress on June 23, 1947, effective August 23, 1947. Section 185 (a) Title 29, USCA, being a part of that act, provided for suits for violation of contracts such as the one now under consideration, to be brought in the Federal Courts.

The contract sued on provided that it should remain in effect until May 16, 1947 and thereafter from year to year unless terminated or modified as therein provided.

It could be terminated only by notice from either party to the other of its desire to terminate same, at least thirty days prior to the initial expiration date. No such notice was given by either party and, accordingly, Petitioners state that the contract is still in full force, although Respondent herein has continuously refused since May 20, 1947 to comply with its provisions.

Petitioners submit that in addition to the jurisdiction inherent in Federal Courts of equity to enforce this contract, such jurisdiction was expressly conferred by the provisions of Section 185 (a) of the Labor Management Act, above referred to.

This question, so far as we can determine, has never been decided by this Court; that is, so far as the Labor Management Relations Act is concerned. However, by implication and following the reasoning in analagous cases decided by this Court, we submit that the question has been determined in favor of Petitioners' contention.

See:

National Labor Relations Board vs. Carlisle Lumber Company, 94 Fed. 2d. 138 (CCA) Cert. Den. 59 S. Ct. 1045, 304 U. S. 575, 82 L. ed. 1539.

Jeffery-DeWitt Insulator Company vs. National Labor Relations Board, 91 Fed. 2d. 134, cert. den. 58, S. Ct. 55, 302 U. S. 731, 82 L. ed. 565.

National Labor Relations Board vs. Remington Rand, 130 Fed. 2d. 919, Cert. Den. 58 S. Ct. 1046; 304 U. S. 576, 82 L. ed. 1540, rehearing den. 58 S. Ct. 1054, 304 W. S. 590, 82 L. ed.

1549; Cert. Den. 58 S. Ct. 1061, 304 U. S. 585, 82 L. ed. 1546.

Bethlehem Corporation vs. National Labor Relations Board, 114 Fed. 2d. 950, Cert. Den. 61 S. C. 448, 312 U. S. 710, 85 L. ed. 1141.

None of the cited cases deal with the Labor Management Relations Act. The point involved in each of these cases was whether or not the National Labor Relations Act would apply in cases where controversies existed at the date of the passage of that Act. In each case, even though the employees concerned were at that date on strike, the Court held that those employees remained employees of the Company, and acquired such rights as were granted under the new Act. In passing on this point, the Court has stated:

> "The mere fact that the labor dispute had commenced prior to the passage of the Act does not withdraw the parties or the dispute from the regulatory power of Congress as to acts subsequently occurring." *(Jeffery-DeWitt Insulator Company vs. National Labor Relations Board, Supra.)*

In the instant case the dispute or controversy was current at the date of the enactment of the ~~NATIONAL~~ LABOR RELATIONS ACT; according to the allegations of the original bill of complaint, it was a continuing controversy. According to the allegations of the amendment proposed, but disallowed, negotiations continued between the parties long after the passage of that Act, and long after that time the Company refused to arbitrate the differences, according to the terms of the contract. We submit that under those undisputed allega-

tions there can be no doubt but that Section 185 (a) of the Act expressly confers jurisdiction upon the Federal Courts to determine this controversy.

The Fifth Circuit Court of Appeals refused to adopt Petitioners' contention, stating:

> "The wrongful breach of such (contractual) relations does not confer federal court jurisdiction unless there is diverse citizenship". (Appendix B.)

In so holding, we submit that Court entirely ignored Section 185 (a), which specifically confers federal jurisdiction in suits for wrongful breach of a contract, and further ignored the above cited decisions by this Court which hold by analogy, at least, that, that Section applies where disputes were pending at the date of its enactment.

CONCLUSION.

The original bill in this cause seeks relief by way of mandatory injunction to compel Respondent to arbitrate the differences which have arisen over the terms of the contract involved. We submit that there is no other method by which arbitration can be compelled.

We further submit that the Court below has wrongfully denied Petitioners their right to sue in these causes in the Federal Courts, for which Petitioners pray a review of the judgment of the Circuit Court of Appeals for the

Fifth Circuit herein, and upon such review a reversal of the judgment and such other relief as to which Petitioners may be deemed entitled.

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APPENDIX "A".

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

Nos. 12504, 12505.

AMALGAMATED ASS'N OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ET AL.,

versus

SOUTHERN BUS LINES, INC., (two cases).

Feb. 24, 1949.

SIBLEY, Circuit Judge: These actions, brought by a labor union as a collective bargaining agency, joined by one employee, against Southern Bus Lines, Inc., as employer, are founded on the same collective contract but seek different relief. Both were dismissed for lack of venue in the district court for the Southern District of Mississippi, and because that court, if a proper venue, was *forum non conveniens*. The two appeals taken present the same questions.

The union is unincorporated, but has its headquarters at Shreveport, Louisiana. The employee plaintiff is an officer of the union and resides in the Southern District of Mississippi. The Southern Bus Lines is a corporation of Louisiana with its principal office at Alexandria, Louisiana, where all its records are and its officers reside, and where the collective bargaining was made. Its business of running busses is done and the collective bargain applies throughout several States, including Mississippi. In order to do business in Mississippi it has appointed an agent in that State to receive service of process in any suit. Federal jurisdiction is rested on the contention that the controversy arises out of the laws of the United States about collective bargains between employer and employees in interstate commerce. In one action it is claimed that the employer refused to arbitrate a difference as provided by the collective contract and the employees struck to force arbitration; and the relief sought is damages for loss of wages during the strike. In the other action the relief sought is a mandatory injunction to compel arbitration. We are not here concerned with the proper construction of the collective contract, or the appropriateness of either relief, which are questions not reached in the district court; but we consider only whether there is venue in the Southern District of Mississippi; and if so whether the forum is so inconvenient as to justify dismissal.

(1, 2) These actions were filed and dismissed before the revision of Title 28 of the United States Code Annotated took effect. In Section 1391 (c) thereof it is provided: "A corporation may be sued in any judicial

district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." These plaintiffs could today dismiss their appeal and bring their actions in the Southern District of Mississippi under this section. But the section is not retroactive, and does not affect the merits of the cause, and we feel bound to review the dismissal under the law as it stood when the actions were filed. That former law, as expounded in *Neirbo Co. v. Bethlehem Steel Shipbuilding Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R., 1437, gave venue as against this corporation in the Southern District of Mississippi, for it had, in order to do business in that State, complied with a statute which required it to appoint an agent in the State "upon whom service of process may be had in the event of any suit against said corporation." The agent resided in the Southern District of Mississippi, if that fact is of importance. It is immaterial that the case is not one in which federal jurisdiction rests solely on diversity of citizenship. The basis of the Neirbo decision is that the appointing of the agent under such a statute is a consent by the corporation to be sued in the State which waives the right to be sued only in the district of which it is an inhabitant, irrespective of the basis of federal jurisdiction. The present cases arise in part out of the business which the Bus Lines sought to do in Mississippi.

(3, 4) As to *forum non conveniens* most recently discussed in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055, we again must differ with the

district court. The forum chosen in Mississippi is not seriously distant from that across the river in Louisiana, there is no prospect of numerous witnesses to be called from Louisiana at great inconvenience or expense to the Bus Company, and the law of Louisiana is not that to be applied. These cases indeed are very likely to go off on question of law. Dismissal for inconvenience is not to be visited except when the choice of forum is a real hardship, or an imposition on the court. But here again we meet the Revision of Title 28, for Section 1404 providing for a change of venue is: "(a) for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." This section applies to pending cases, and these actions might have been brought in the Western District of Louisiana where the principal office of the Bus Lines is. Transfer is a less drastic matter than dismissal, for it involves no loss of time or pleading or costs; and no doubt a broader discretion may be exercised in ordering it. The dismissal on the ground of inconvenience must also be reversed, but without prejudice to a consideration of a change of venue.

The judgments appealed from are set aside and the causes remanded for further proceedings not inconsistent with this opinion.

APPENDIX "B".

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 13,389.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY, AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ETC., ET AL.,

Appellants,

versus

SOUTHERN BUS LINES, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(May 10, 1951.)

Before HUTCHESON, Chief Judge, and McCORD and BORAH, Circuit Judges.

BORAH, Circuit Judge: The plaintiffs-appellants, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division No. 1127, a labor organization, brought this action for the benefit of the plaintiff R. E. Harper, and all other union members and employees of defendant Southern Bus Lines, Inc.,

who are similarly situated, to compel the defendant-appellee to arbitrate proposed changes in an alleged existing contract of employment. The appellee moved to dismiss the complaint for want of jurisdiction and for failure to state a claim upon which relief could be granted. The District Court held that the allegations in the complaint did not state a ground for relief, and from the ensuing judgment of dismissal, this appeal was taken.

While the assignments of error relate to the court's dismissal of the case on the merits, the question of jurisdiction has been raised in argument and must be first considered.

As grounds for jurisdiction, the complaint alleges "that this suit is based upon facts arising out of Interstate Commerce and under a contract between the plaintiffs and the defendant involving interstate transportation and, therefore comes within the provisions of the statutes of the United States of America governing the interstate transportation of passengers, freight and other commodities, and is controlled by the laws of the United States and the contract hereinafter referred to which was made pursuant to the obligations of all of the parties to contract for the interstate transportation above referred to." The complaint then alleges that the Union, acting for and on behalf of its members, entered into a contract with the defendant effective May 16, 1947; that under the terms of the agreement if modification or termination of the contract was desired, it was the duty of either party to give notice in writing to the opposite party of

that desire at least thirty days prior to May 16, 1947, the expiration date of the original year of the contract; that on the 14th day of April, 1947, the plaintiffs gave proper notice to the defendant of their desire to have certain modifications made in the contract and the defendant countered with a like proposal; that plaintiffs and the defendant negotiated for many days on the subject of the modifications of the existing contract and when it became apparent that no agreement could be reached, the plaintiffs demanded arbitration of the issues, in conformity with the contract, but the defendant refused and still refuses to accede to this request and because of this consistent refusal plaintiffs are entitled to a mandatory injunction, requiring the defendant to arbitrate with the plaintiffs all issues between them.

Upon the allegations of the complaint, we think it clear that the court below did not have jurisdiction over this controversy. No facts are alleged upon which the conclusion can legitimately be based that the District Court independently of the arbitration agreement would have jurisdiction of the "subject matter of a suit arising out of the controversy between the parties" as required by Section 4 of the Federal Arbitration Act, 9 U. S. C. A. Sec. 4. *Agostini Bros. Building Corporation v. United States,* 4 Cir., 142 F. (2) 854, 857. No allegation is made that the amount in controversy exceeds $3,000, and more important, the complaint admits that there is no diversity of citizenship between the parties. The litigation therefore is halted at the threshold by the lack of facts which open the door to federal litigation unless there are to be found in the complaint sufficient allega-

tions to disclose that the controversy is one which arises "under the Constitution, laws, or treaties of the United States," Title 28, Sec. 1331, U. S. C. A., and "the matter in controversy exceeds the sum or value of $3,000."

Nowhere in the complaint is it alleged that any provision of the federal constitution or a federal treaty or a law of the United States is involved. Nor is it alleged that there is a substantial dispute between the parties respecting the validity, construction or effect of some law of the United States, upon the determination of which the result depends.

> "It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth." Shulthis v. McDougal, 225 U. S. 561, 569. The question of jurisdiction must be determined from the face of the complaint. City Railway Co. v. Citizens' Street Ry. Co., 166 U. S. 557; Cuyahoga-River Power Co. v. City of Akron, 240 U. S. 462. The jurisdiction of a federal court is never to be presumed, but must be made to affirmatively appear. Grace v. American Central Ins. Co., 109 U. S. 278, 283; Neel v. Pennsylvania Co., 157 U. S. 153.
>
> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." *Shulthis v. McDougal, supra.*

In *Gulley v. First National Bank*, 299 U. S. 109, 112 the Supreme Court re-affirmed the same doctrine and speaking through Mr. Justice Cardozo said:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statutes, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. Starin v. New York, 115 U. S. 248, 257, 6 S. Ct. 28, 29 L. Ed. 388; First National Bank v. Williams, 252 U. S. 504, 512, 40 S. Ct. 372, 374, 64 L. Ed. 690. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. Ibid; King County v. Seattle School District, 263 U. S. 361, 363, 364, 44 S. Ct. 127, 128, 68 L. Ed. 339."

Viewing the case at bar against this background of established principle, we do not find in it the elements of federal jurisdiction. What is here involved is merely a controversy between the parties as to the construction of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but only arises from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship. *Barnhart v. Western Maryland Ry. Co.*, 128 F. (2) 709.

Since the court was without jurisdiction, it is unnecessary to consider whether the complaint states a claim upon which relief could be granted. The judgment of the District Court is vacated and set aside and the case is remanded to that court with instructions to dismiss for want of jurisdiction.

APPENDIX "C".

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 13,388.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY, AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ETC., ET AL.,

Appellants,

versus

SOUTHERN BUS LINES, INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(May 10, 1951.)

Before HUTCHESON, Chief Judge, and McCORD and BORAH, Circuit Judges.

BORAH, Circuit Judge: The jurisdictional point involved in this case is the same as that involved in the case of Amalgamated Association of Street, Electric Railway, and *Motor Coacn Employees of America, Division No. 1127, Etc., Et Al. v. Southern Bus Lines, Inc., No. 13,389*, this day decided; and, on the authority of that decision, the judgment of the District Court is vacated and set aside and the case is remanded to that court with instructions to dismiss for want of jurisdiction.

APPENDIX "D".

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 13,939.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY, AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ETC., ET AL.,

Appellants,

versus

SOUTHERN BUS LINES, INC.,

Appellees.

No. 13,940.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY, AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ETC., ET AL.,

Appellants,

versus

SOUTHERN BUS LINES, INC.,

Appellees.

Appeals from the United States District Court for the Southern District of Mississippi.

(January 14, 1953.)

Before HUTCHESON, Chief Judge, and HOLMES, and RIVES, Circuit Judges.

HUTCHESON, Chief Judge: When these two cases were here before, the appeals were from judgments dismissing

the complaints on the merits for failure to state a cause of action.

Of the opinion that they should have been dismissed for want of jurisdiction, this court reversed the judgments and remanded the causes, with specific directions to dismiss them for want of jurisdiction.

This time the appeals are from judgments entered not only in accordance with the law of the state as established on the former appeals, but in execution of, and in precise accord with, our mandates.

In such circumstances, unlike where judgments of reversal are general, appeals from the judgments entered on the mandates present nothing for our review. The appeals are, therefore, dismissed.

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WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 717

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ET AL.,

Petitioner,

versus

SOUTHERN BUS LINES, INC.,

Respondent.

BRIEF FILED ON BEHALF OF RESPONDENT IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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STEVENS & CANNADA,
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Jackson, Mississippi;

STAFFORD & PITTS,
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Alexandria, Louisiana;
Attorneys for Respondent,
Southern Bus Lines, Inc.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No._____

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION No. 1127, ET AL.,

Petitioner,

versus

SOUTHERN BUS LINES, INC.,

Respondent.

BRIEF FILED ON BEHALF OF RESPONDENT IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT OF THE CASE.

This action is a companion to Cause No. 13,939 on the docket of the United States Court of Appeals, for the Fifth Circuit, bearing the same style as this case, and as

a brief here we refer the Court to our brief in the other case.

The jurisdictional allegations in the two complaints are identical, the sole difference between the two complaints being the nature of the relief sought. In Cause No. 13,939 respondent sued to recover damages, whereas in this cause, No. 13,940, they demanded a mandatory injunction compelling the respondent to arbitrate the issues between the parties.

In view of the fact that the jurisdictional allegations were identical, the Court of Appeal on the last appeal of these cases wrote one opinion dismissing the appeals.

We point out that in our opponents' brief in this case it is stated that all of the facts alleged in this cause are the same as the facts alleged in the other one. They also conceded, in their brief, that unless the District Court had original jurisdiction under the bill of complaint, it did not have jurisdiction under the *Federal Arbitration Act.*

For the reasons that we have discussed in the other brief, we submit that the original complaint, taken together with the proposed amendment, clearly show that right of action, alleged upon by plaintiffs arose out of contractual relations, and not under the laws of the United States.

We submit, therefore, the Courts of the United States did not have jurisdiction of this action.

CONCLUSION.

For the reasons set out in our other brief and because of the argument in support thereof, we submit that petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE.

I, Carl B. Callaway, of counsel for respondent, do hereby certify that I have mailed, postage fully prepaid, a true copy of the foregoing brief to opposing counsel of record on this the _____ day of May, 1953.

CARL B. CALLAWAY,
Of Counsel for Respondent.